

**United States Department of Labor
Employees' Compensation Appeals Board**

G.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pikeville, KY, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 10-602
Issued: December 3, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 5, 2010 appellant filed a timely appeal from a July 10, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to justify termination of appellant's compensation benefits for his accepted injury effective January 8, 2009.

FACTUAL HISTORY

On October 5, 2006 appellant, then a 51-year-old sales service associate filed a traumatic injury claim alleging that, on the same day, he experienced low back pain while lifting a tub of mail. The Office accepted the claim for a lumbar strain. Appellant returned to limited-duty work on October 14, 2006 and worked intermittently thereafter.

Appellant was initially treated by Dr. Samuel J. King, a family practitioner, on November 14, 2006, for low back pain after a lifting injury at work. Dr. King diagnosed acute lumbar strain and spasms and aggravation of degenerative disc disease. Appellant came under the treatment of Dr. K. Michael Webb, a Board-certified neurologist, from December 2, 2006 to

July 16, 2007, for left-sided paraspinal muscle pain caused by an October 5, 2006 lifting incident at work. Dr. Webb diagnosed back pain secondary to degenerative disc disease exacerbated by appellant's work injury. He noted appellant was treated conservatively without success and advised that he was not a candidate for surgery. Dr. Webb indicated that appellant was at maximum medical improvement and opined that he was unable to return to his previous position due to neuropathic pain and weakness which made it difficult to stand, bend or twist. An October 24, 2006 lumbar spine magnetic resonance imaging (MRI) scan revealed mild degenerative annular disc bulges at the L3-4 and L5-S1 levels.

On June 25, 2007 the Office referred appellant to Dr. Richard T. Sheridan, a Board-certified orthopedist for a second opinion. In a July 25, 2007 report, Dr. Sheridan indicated that he reviewed the records provided and examined appellant. He diagnosed lumbosacral sprain, resolved, and nonwork-related lumbar degenerative disc disease at L3-4, L4-5, L5-S1, lateral stenosis at L3-4 and L4-5 and foraminal stenosis at L5-S1. Dr. Sheridan noted examination findings and opined that the work-related lumbar sprain resolved. He found that appellant's current condition was due to the natural progression of his underlying nonwork-related lumbar degenerative disc disease at L3-4, L4-5, L5-S1, lateral stenosis at L3-4, L4-5, foraminal stenosis at L5-S1 and exogenous obesity. Dr. Sheridan opined that the accepted lumbar sprain had resolved and appellant was medically capable of returning to his date-of-injury position as a sales service associate without restrictions.

Appellant submitted reports from Dr. King dated October 27, 2006 to August 17, 2007 who diagnosed mechanical back pain syndrome, lumbosacral strain, S1 joint sprain, degenerative disc disease, intermittent muscle spasms and radiculopathy. Also submitted was an August 20, 2007 report from Dr. Webb who diagnosed degenerative disc disease at L3-4, L4-5, L5-S1, right leg pain and weakness at L5 and opined that appellant's pain level would prevent him from returning to work.

The Office found that a conflict of medical opinion existed between Dr. Webb, appellant's treating physician, who indicated appellant had residuals of his work-related injuries and was disabled and could not return to his preinjury position, and Dr. Sheridan, an Office referral physician, who determined that appellant's work-related condition had resolved and appellant could return to his preinjury position.

On October 10, 2007 appellant was seen by Dr. Phillip A Tibbs, a Board-certified neurosurgeon, to whom appellant was referred by Dr. King, who noted that an October 24, 2006 lumbar spine MRI scan revealed degenerative changes and a central herniation but no nerve root compression. Dr. Tibbs did not recommend surgery and opined that appellant could work subject to restrictions. On November 5, 2007 appellant underwent a functional capacity evaluation which showed that he could perform light to medium work with lifting restrictions.

To resolve the conflict the Office, on October 10, 2007, referred appellant to a referee physician, Dr. Yogesh Chand, a Board-certified orthopedist, who indicated, in an October 31, 2007 report, that he reviewed the records provided and examined appellant. Dr. Chand reviewed appellant's job requirements, noted a history of appellant's work-related injury and reviewed treatment following the injury. He noted examination findings of an unremarkable thoracic spine, tenderness at L4 and L5 and the right sacroiliac joint, limited lumbar range of motion and positive straight leg raising on the right. Dr. Chand diagnosed chronic sprain of the lumbar spine. He noted it was unclear if there was a permanent or temporary aggravation of the

preexisting osteoarthritis of the lumbar spine and chronic sprain of the right sacroiliac joint and recommended additional studies including a lumbar MRI scan and an electromyogram (EMG). Dr. Chand opined that appellant had not reached maximum medical improvement and was not able to return to his preinjury position.

On December 11, 2007 the Office requested authorization for Dr. Chand to perform the requested diagnostic testing. It requested that, after reviewing the updated MRI scan of the lumbar spine and EMG, he provide an opinion as to whether appellant's lumbar strain had resolved and whether or not the work injury of October 5, 2006 aggravated the preexisting degenerative disc disease.

Appellant submitted December 12, 2007 and March 12, 2008 reports from Dr. King who noted that appellant returned to work with restrictions. Dr. King diagnosed chronic mechanical pain syndrome from the work injury, lumbosacral strain with exacerbation, S1 joint sprain, lumbosacral spondylolysis, lumbar radiculopathy and intermittent muscle spasm.

Appellant underwent a lumbar spine MRI scan, performed for Dr. Chand, on February 21, 2008 which revealed degenerative disc disease at L3-4 and L5-S1.

On April 7, 2008 Dr. Chand noted reviewing the February 21, 2008 MRI scan and noted that an EMG had not been performed. He opined that appellant had reached maximum medical improvement. Dr. Chand indicated that appellant had preexisting degenerative joint disease which was not symptomatic prior to the October 2006 injury and noted that the aggravation appellant sustained was temporary. He indicated that appellant could not return to his preinjury position for two to three years but would recover from the temporary aggravation. Dr. Chand advised that if appellant failed to recover it would be due to the preinjury degenerative arthritis that would further deteriorate as a result of aging. In a work capacity evaluation dated April 7, 2008, he noted that appellant could return to work full time with restrictions.

Appellant underwent an EMG dated April 8, 2008 which revealed chronic S1 radiculopathy with possible nerve root compression at S1 and recommended that appellant return for the needle portion of the EMG to determine his prognosis more accurately.

On May 21, 2008 the Office requested Dr. Chand review the EMG performed on April 8, 2008 and provide an amended report. On May 27, 2008 Dr. Chand recommended appellant complete the EMG needle study and revisit Dr. Tibbs to determine whether surgery was appropriate and, if not, to determine permanent impairment.

On July 8, 2008 appellant underwent an EMG which revealed chronic right greater than left S1 radiculopathies.

In a memorandum dated August 4, 2008, the Office indicated that Dr. Chand was given the opportunity to resolve the conflict of opinion in this case and did not do so. It referred appellant to a second referee physician to determine the extent of appellant's work-related injury and that of his preexisting conditions.

On September 2, 2008 the Office referred appellant to a referee physician, Dr. Melvin Heiman, a Board-certified orthopedist. In an October 2, 2008 report, Dr. Heiman noted reviewing the records provided and examining appellant. He reviewed appellant's job

requirements, noted a history of appellant's work injury and reviewed treatment following the injury. Dr. Heiman noted findings upon physical examination of obesity, normal curvature of the back, no abnormal muscle spasm, S1 joint notch was nontender, straight leg raises were negative, intact sensation and motor strength, normal hip and knee motion and no measurable atrophy of the thigh or calf. He opined that the work-related lumbar strain resolved and the current medical condition was related to the natural progression of degenerative disc disease and foraminal stenosis. Dr. Heiman noted that these findings preexisted appellant's injury and may have temporarily been worsened by this accident but these symptoms would have occurred had he not been injured on the job. He opined that appellant's current condition was related to the underlying degenerative disc disease and osteoarthritis which was a preexistent condition exacerbated by the work accident. Dr. Heiman opined that appellant's aggravation was temporary for about a year and the remaining disability was related to his underlying condition. He indicated that appellant could work light duty with restrictions that related to the underlying problem and not to his industrial accident.

On November 10, 2008 the Office issued a notice of proposed termination of all compensation benefits on the grounds that Dr. Heiman's report established no residuals of the work-related lumbar strain.

On December 5, 2008 appellant objected to the proposed termination of benefits. He advised that he returned to work limited duty with medical treatment and medication which were necessary to permit him to continue to work and function on a daily basis. Appellant submitted a July 8, 2008 EMG previously of record. Also submitted was a December 4, 2008 report from Dr. King who diagnosed lumbosacral strain, L5-S1 radiculopathy, degenerative disc disease with bulging and lateral recess stenosis. He opined that appellant's degenerative changes preexisted his injury but were aggravated by his injury and his symptoms worsened with prolonged standing and weight bearing. Dr. King noted that appellant reached maximum medical improvement and continued to remain symptomatic from his occupational injury and arousal of preexisting degenerative changes.

On January 8, 2009 the Office terminated appellant's compensation and medical benefits effective the same day for the accepted condition of lumbar strain on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from his accepted employment injuries.¹

Appellant requested an oral hearing which was held on May 27, 2009. He submitted a March 12, 2008 report from Dr. King which was previously of record. Also submitted were prescription notes from Dr. King dated January 14, 2009 which excused appellant from work on November 14, 2008 and January 14, 2009 for medical examination for his back injuries. In a February 28, 2009 duty status report, Dr. King diagnosed lumbosacral strain, sacroiliac sprain, L5-S1 radiculopathy, lumbar spondylosis and degenerative disc disease and returned appellant to work with restrictions. Similarly, on March 2, 2009 Dr. King diagnosed lumbosacral strain, sacroiliac sprain, L5-S1 radiculopathy, lumbar spondylosis and degenerative disc disease and noted that appellant still had residuals from his injury.

¹ Appellant claimed compensation for four hours of leave without pay on November 14, 2008. On January 7, 2009 the Office denied this claim and on April 2, 2009 it denied modification of the prior decision.

In a decision dated July 10, 2009, the hearing representative affirmed the January 8, 2009 Office decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁴

ANALYSIS

The Office accepted appellant's claim for lumbar strain. It determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Webb, a Board-certified neurologist, who found that appellant had residuals of his work-related lumbar strain and was totally disabled, and Dr. Sheridan, an Office referral physician, who determined that the lumbar strain of October 5, 2006 had resolved and that appellant could return to work.⁵ Consequently, the Office referred appellant to Dr. Heiman to resolve the conflict.⁶

The Board finds that, under the circumstances of this case, the opinion of Dr. Heiman is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant's work-related lumbar strain has ceased. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the

² *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

³ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁴ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

⁵ See 5 U.S.C. § 8123(a) (if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary of Labor shall appoint a third physician who shall make an examination).

⁶ The Board notes that the Office initially referred appellant to Dr. Chand to resolve the medical conflict. After Dr. Chand's initial report indicated that further testing was needed, it authorized the testing and requested supplemental reports from Dr. Chand on December 11, 2007 and May 21, 2008. However, his supplemental reports dated April 7 and May 27, 2008 were vague, speculative and lacking in rationale and insufficient to resolve the medical conflict. The Office properly referred appellant to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue. See *L.R. (E.R.)*, 58 ECAB 369 (2007); *Guisepppe Aversa*, 55 ECAB 164 (2003) (where the Office secures an opinion from an impartial specialist for the purpose of resolving a medical conflict and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion; if the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial specialist).

purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁷

In his report of October 2, 2008, Dr. Heiman reviewed appellant's history, reported findings and noted that appellant exhibited no objective complaints or definite work-related abnormality in his condition. He noted appellant was overweight, sensation and motor strength were intact with no measurable atrophy of the thigh or calf. Dr. Heiman opined that the work-related lumbar strain resolved and the current medical condition was related to the natural progression of degenerative disc disease and foraminal stenosis. He opined that appellant's current condition of mechanical back pain with underlying degenerative disc disease and osteoarthritis was a preexistent condition exacerbated by the work incident and the remaining disability was related to his underlying degenerative condition. Dr. Heiman indicated that appellant could work light duty with restrictions that related to the underlying degenerative condition and not to his industrial accident. He found no basis on which to attribute any continuing residuals or disability to the accepted October 5, 2006 work injury.

Thereafter, appellant submitted a July 8, 2008 EMG previously of record. Also submitted was a December 4, 2008 report from Dr. King who diagnosed lumbosacral strain, L5-S1 radiculopathy, degenerative disc disease with bulging and lateral recess stenosis. Dr. King opined that appellant's degenerative changes preexisted his work injury but were aggravated by his injury and he continued to be symptomatic. However, he did not specifically explain how any continuing condition or medical restrictions and disability were causally related to the accepted employment injuries. Dr. King's report is insufficient to overcome that of Dr. Heiman or to create a new medical conflict.⁸

After issuance of the termination of benefits, appellant submitted a March 12, 2008 report from Dr. King which was previously of record. Also submitted were prescription notes from Dr. King dated January 14, 2009 excusing appellant from work on November 14, 2008 and January 14, 2009 due to his back condition. Appellant submitted a February 28, 2009 duty status report from Dr. King who diagnosed lumbosacral strain, sacroiliac sprain, L5-S1 radiculopathy, lumbar spondylosis and degenerative disc disease and returned appellant to work with restrictions. Similarly, on March 2, 2009 Dr. King diagnosed lumbosacral strain, sacroiliac sprain, L5-S1 radiculopathy, lumbar spondylosis and degenerative disc disease and opined that appellant had residuals from his injury. However, none of his reports specifically address how any continuing condition or medical restrictions and disability were causally related to the accepted employment injuries. Thus, Dr. King's reports are insufficient to overcome that of Dr. Heiman or to create a new medical conflict.

The Board finds Dr. Heiman had full knowledge of the relevant facts and evaluated the course of appellant's condition. He is a specialist in the appropriate field. Dr. Heiman offered no basis to support that appellant had residuals or work-related disability from the accepted lumbar strain. His opinion as set forth in his report of October 2, 2008 is found to be probative evidence and reliable. The Board finds that Dr. Heiman's opinion constitutes the weight of the

⁷ *Solomon Polen*, 51 ECAB 341 (2000). See 5 U.S.C. § 8123(a).

⁸ See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board notes that Dr. King's report did not contain new findings or rationale on causal relationship upon which a new conflict might be based.

medical evidence and is sufficient to justify the Office's termination of benefits for the accepted conditions of lumbar strain.⁹ There is no other medical evidence sufficient to overcome his opinion or to create a new medical conflict.

On appeal appellant asserts that he continued to have residuals of his work-related lumbar condition and references the July 8, 2008 EMG and Dr. Chand's reports in support of his claim. The Board notes that, although the EMG revealed chronic right greater than left S1 radiculopathies, the test failed to address whether appellant had residuals or work-related disability from the accepted lumbar strain. With regard to Dr. Chand's reports, as noted above, he failed to resolve the conflict of opinion in this case after the Office attempted to secure a supplemental report for the purpose of clarifying his opinion and correcting the defect in the original opinion.

CONCLUSION

The Board finds that the Office has met its burden of proof to terminate benefits effective January 8, 2009.

ORDER

IT IS HEREBY ORDERED THAT the July 10, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 3, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁹ In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).